MEDIATION ADVOCACY
NUTS AND BOLTS

Eric Galton

Mediation Advocacy Nuts and Bolts

by

Eric Galton[1]

[1] Eric Galton is a co-founder of the Lakeside Mediation Center in Austin, Texas. Galton is a Past President and Knight of the International Academy of Mediators. Galton is a Distinguished Credentialed Mediator and his book, *Stories Mediators Tell*, and co-authored by Professor Lela Love was published by the ABA in 2013.

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In 1991, I wrote my first book on mediation advocacy, Texas Mediation Guide,[2] which later became Representing Clients at Mediation.[3] At that time mediation was fairly new, and lawyers were looking for guidance as to how to best represent their clients at mediation. Today, more than 20 years later, most lawyers have attended dozens, if not hundreds, of mediations and have worked with many mediators. In this article, I will describe things lawyers can do to become better advocates and make their mediations more successful.

Setting up the Mediation for Success

Many lawyers believe the only preparation for mediation is to select a mediator, a date for the process, and possibly send the mediator a written position paper. In reality, much should be done by the advocates *when setting up* the mediation to posture it for success. The list below provides good items to discuss and consider when setting up a mediation.

Half Day, Whole Day, Multiple Days

Many disputes involving amounts in controversy less than $100,000, barring significant emotional issues, may be mediated in four hours or less. Cases involving amounts in controversy over $100,000 that involve significant emotional issues, or which involve multiple parties, typically require a full day mediation. Large, very complex commercial cases may involve multiple days of mediation, especially if the parties intend to make comprehensive presentations at the mediation.

Who Will Attend?

A mediation should not be scheduled without a clear understanding of who will physically attend. Many mediations that do not settle result from disappointment that a decision-maker was not present, or at least available, during the mediation session. In this regard, if a decision-maker will be unable to physically attend the mediation, the parties should agree that the decision-maker be easily reachable throughout the mediation session and/or attend the session via telephone.

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[2] Eric Galton, *Mediation: A Texas Practice Guide*, Texas Lawyer Press (1993).

[3] Eric Galton, *Representing Clients in Mediation*, American Lawyer Media (1994).

Desired Mediation Styles

Many mediators employ a variety of mediator styles, while others have a particular style or approach. Every case involves different dynamics. For example, some mediations require a evaluative approach, others do not. Certain mediators are excellent at dealing with high-emotion cases, while others are not. The question for the advocate is: What type of mediator does this particular case need?

What Documents Need to be Exchanged?

Counsel should discuss which documents need to be exchanged, and how far in advance of the mediation session the exchange must occur. For example, a surgical report handed to a claims representative on the day of mediation will not be considered as part of the settlement value. Generally, documents need to be submitted at least 21 days in advance of a mediation session to be considered. Counsel must discuss what documents are needed for an evaluation to be made.

Will There Be a Joint Session? What Type?

In the author's opinion, there should almost always be a joint session. There are a myriad of benefits to participants, including:

- the parties,
- both parties' counsel, and
- the mediator,

all together in a single session. A properly crafted and designed joint session not only avoids negative reaction, but may also set a constructive tone for a successful mediation.

Counsel may choose from a variety of joint sessions styles:

A full-joint session might include presentations by both the counsel and the parties.

A counsel-joint session might include only remarks by counsel.

A party-only presentation might be in order in commercial disputes, with parties of equal bargaining power and sophistication.

A "meet-and-greet" joint session with only the mediator making comments might be appropriate in other types of cases.

Counsel should discuss what type of joint session is needed for a particular case, and engineer joint sessions that will be productive and useful.

Pre-mediation Submissions

Most mediators request pre-mediation submissions. The pre-mediation position paper allows the mediator to become familiar with the dispute and tailor the mediation session appropriately. Yet many lawyers either fail completely to provide a position paper, or merely attach pleadings.

In Texas, the tradition has been to submit the position paper in confidence to the mediator. An emerging trend, and a good one, is for counsel to exchange position papers. Exchanging position papers with opposing counsel prior to a mediation session allows for re-evaluation, and additionally, they can be freely used during the process. If counsel wish to send a supplementary submission for the mediator's eyes only, counsel may also do so.

For a submission to be effective, the submission must be timely so that the mediator may read and consider it. Additionally, the submission should include:

- a concise statement of the facts,
- the negotiation history to date, and
- any significant issues of law.

Receiving a timely and well-crafted submission allows the mediator to better plan a mediation session, and instills the mediator with a sense of confidence that counsel is prepared.

Planning and Heads-Up Calls to Mediator

Sometimes it is useful for all counsel to have a planning conference by telephone with the mediator to discuss many of the items discussed in this article, and to obtain mediator feedback about process choices. Additionally, counsel might want to have a private "heads up" call with the mediator to discuss sensitive issues and topics in advance. The ex parte rules do not apply to mediation, so counsel may freely contact the mediator at any time.

Exchange Settlement Drafts in Advance

This is a new and hugely helpful trend. Counsel exchange settlement documents in advance, with blanks left for amounts, and bring these documents on their laptops to the mediation session. One major benefit of such an approach is that it identifies all collateral terms that might be part of an agreement in advance, such as indemnity, confidentiality, who is to be released, etc. Exchanging settlement drafts avoids surprises when the negotiations begin.

Next, if the mediation is successful, the settlement documents are already drafted, which avoids delay at the end of the day when the parties are tired or catching airplanes. Thus, the practice of exchanging settlement documents in advance is extremely useful and counsel should consider doing so.

Make a Demand in Advance

Counsel should discuss if a demand should be made in advance, and if so, how far in advance. Counsel should also discuss whether a response to the demand will be made before or at the mediation session.

Mediation is a supervised negotiation and counsel should be certain that the negotiation path is clear and understood. If the claimant wishes to have an insurance representative with adequate authority, a demand for that representative's presence should typically be made at least 14 days in advance of a mediation session.

Dispositive Motions Exchanged in Advance

A summary judgment motion shared for the first time at the mediation may be dramatic—but it's also nearly always ineffective. If dispositive motions are going to be filed and counsel believes the motion should be part of the evaluation, counsel should exchange such motions in advance of the mediation session.

Will Lien-holders Attend?

Counsel should discuss whether any third-party lien-holders should attend the session, or if they at least will be available during the session. Many cases receive concessions by lien-holders for the case to settle, but this must be planned for in advance. Certainly, some lien-holders will not negotiate until a settlement amount is reached. Regardless, counsel should at least know the amount of the lien and, if possible, have a representative available by telephone during the mediation session.

Working with the Mediator Effectively

Currently, this user market has sorted out what it likes and what it does not like about mediators. The market clearly does not like mediators who are note-passers, i.e., simply passing messages back and forth from room to room. The market is not fond of the omniscient mediator, i.e., the mediator who, with a fraction of the counsel, believes he knows how the case will turn out and what the settlement should be. The market very much likes the proactive mediator, i.e., a mediator who employs a variety of techniques and who is involved in creating a successful negotiation.

If a bright line needs to be drawn, the mediator is the steward of process decisions (how the mediation will be approached) and the advocates are the stewards of the outcome (what the settlement should look like). The advocate needs to understand that a full-time, committed mediator (as opposed to a hobbyist) typically takes 20-50 hours of continuing education annually, studies negotiation, psychology, neuroscience, and mediation process, is likely an active member of state and national mediation groups, is a participant in some type of certificate and credentialing program, and often has published, or served as an adjunct on a university level. Professional mediators spend a great amount of time thinking about the best process for a particular dispute. In mediation, because disputes are all different, one-size-fits-all does not work.

In this regard, when advocates plan for the mediation, they should consider consulting with the mediator about what type of process would best suit the needs of their case.

Advocates may also look at a mediator as a negotiation coach. Mediators study negotiation and preside over hundreds, if not thousands of negotiations. As a coach, the mediator is not present to tell counsel what to do. Rather, the mediator is available to provide input throughout the mediation and help steer the negotiations in a more constructive direction.

Advocate's Opening Presentation

When faced with the idea of an opening presentation, some advocates are simply lazy and suggest, "Everyone knows what the case is about." Why would an advocate trust opposing counsel to explain his view of the case? Further, the parties frequently do not agree as to "what the case is all about."

More importantly, why would an advocate ever give up the right to talk directly to the decision-makers on the other side of the case?

Other advocates fear something uncomfortable will occur at a general session, and doom the process to failure. Twenty years of mediation demonstrates such blow-ups occur very infrequently. Also, it's hard to imagine that anything that occurs in a private office could be worse than rigorous cross-examination in a public courthouse in front of twelve strangers.

Professional mediators effectively manage joint sessions, and prepared advocates make exceptional opening presentations at mediation.

In contemplating an opening presentation, the advocate must first understand who he/she is speaking to; namely, the decision-maker or decision-makers on the other side. The advocate's goal is to craft a presentation that her audience will listen to and understand.

An initial consideration is whether or not to use a PowerPoint. PowerPoint's may be very effective *if* they are organized and concise. An opening presentation, with or without a PowerPoint, should be 20 minutes or less.

The tone of the opening presentation should be conversational, cordial, and devoid of threats or negative characterizations. The content of the opening presentation should identify the risks that the other side may confront, and should emphasize the benefits of settlement for all parties in the dispute.

An effective opening demonstrates preparedness and fairly identifies risks. Often, effective presentations have a significant favorable impact on the process, and allows the advocate to shine, without showboating, in front of the client.

Conclusions

Advocates make a significant, and very often favorable, impact on the mediation process. As with trial, preparedness is the key to success. Setting up the mediation correctly is a huge first step in creating a successful mediation process. Advocates should rarely give up a joint session at mediation, since an effective joint session can make a significant difference in the outcome of a mediation.

Over the past 20 years, mediators have become process experts, and their process opinions should be respected. Advocates should remain the guardians of the outcome of the mediation process.